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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 1007

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *Petitioner*,

v.

CERTAIN CARRIERS, REPRESENTED BY THE EASTERN, WESTERN AND SOUTHEASTERN CARRIERS' CONFERENCE COMMITTEES, UNION PACIFIC RAILROAD, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT CARRIERS IN OPPOSITION

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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OPINIONS BELOW

The opinion of the Court of Appeals is attached to the Petition for Certiorari as Appendix H. The opinions of the members of the Arbitration Board are printed in the Joint Appendix filed in *Brotherhood of Locomotive Firemen & Enginemen, et al.* v. *Certain Carriers etc.*, No. 935, 1963 Term, at pp. 31-132. In

addition, the opinion of the neutral members of the Board and the award of the Board were filed as Appendices I and II with the Brief for Respondent Carriers in Opposition in No. 935. The opinion of the District Court, 225 F. Supp. 11, is printed in the Joint Appendix at pp. 368-392 and also as Appendix C to the Petition for Certiorari in No. 935.

QUESTIONS PRESENTED

1. Whether Public Law 88-108 is unconstitutional for lack of adequate standards to guide the arbitrators.

2. Whether petitioner was deprived of due process of law in violation of the Fifth Amendment to the Constitution of the United States because of alleged inadequacies in the findings of fact by the Arbitration Board, because of an allegedly insufficient opportunity for petitioner to present its case to the Board, because of alleged inadequacy of judicial review, or because of the alleged infringement by the statute and the award of petitioner's collective bargaining rights.

3. Whether, for purposes of the three-judge court requirement of 28 U.S.C. 2282, either of the foregoing constitutional questions is "substantial."

4. Whether, under the three-judge court statute, one judge may dismiss a case for want of equity jurisdiction upon grounds apparent at the outset of the proceeding.

5. Whether petitioner was entitled to a three-judge court although it did not seek injunctive relief.

6. Whether the award of the Arbitration Board conformed to the requirements of Public Law 88-108.

STATEMENT

While petitioner's statement of the case is inaccurate in many respects, it is unnecessary to provide a detailed counter-statement since the relevant facts are set forth in the opinion of the neutral arbitrators, in the opinion of the District Court, and in the briefs in opposition of the carrier respondents and the government respondents in No. 935, 1963 Term, *Brotherhood of Locomotive Firemen & Enginemen et al. v. Certain Carriers etc.* (hereinafter referred to as "No. 935").

REASONS FOR DENYING THE WRIT

This petition adds nothing of consequence to the contentions made in No. 935, which have already been answered in the briefs in opposition filed by the respective respondents in that case. As was indicated in the carriers' response in No. 935 (p. 10 n. 5), the suit brought by this petitioner was a companion to that brought by the petitioners in No. 935. Plaintiffs in both cases challenged the award of Arbitration Board No. 282 on constitutional and statutory grounds that were substantially the same, and both lower courts disposed of the cases in sing[illegible] opinions. In these circumstances, we will rely for the most part upon the responses in No. 935, adding only a few additional comments where appropriate.

We wish to emphasize at the outset that every issue discussed in the petition relates to a statute that is applicable only in this particular labor dispute; that every issue has been resolved against petitioner by two lower courts after thorough consideration; and that petitioner points to no conflict of decisions among the Circuit Courts of Appeals. Thus it is evident that the decision in this case cannot substantially affect the

general administration of justice by the federal judiciary. In consequence, we submit that the case would not be worthy of review by this Court even if the decisions below were questionable. In fact, those decisions were clearly correct.

1. Petitioner raises the same constitutional contention as that raised by petitioners in No. 935, *i.e.*, improper delegation of legislative authority. The contention is insubstantial for the reasons given in the carriers' response (pp. 14-20) and the government's response (pp. 19-25) in that case.[1]

2. Petitioner's substantive due process arguments are without merit for the reasons given in the carriers' response (p. 15 n. 7) and the government's response (pp. 20-21) in No. 935.

3. Petitioner urges that a violation of the Fifth Amendment arose because of "the insufficiencies and irregularities of the proceedings leading to the award" (Pet. p. 33). Petitioner does not and cannot support this allegation on the record in this case. Rather, the record establishes, as petitioner conceded in a stipulation at the close of the Board proceedings, that those proceedings had been "fair and proper and that the rights of [the] clients [had] been respected" (J.A. 405).[2] Petitioner's contention is but the afterthought of a disappointed litigant.

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[1] In this connection, it may be noted that the District Court correctly understood that petitioner, like petitioners in No. 935, had limited its constitutional argument to this single issue (J.A. 347-348, 332-333, 333-334; see also J.A. 271Z-10).

[2] The stipulation was made on behalf of petitioner by the attorney who, together with petitioner's present counsel, represented petitioner throughout the proceedings before the Board. See Vol. I, p. 2 of the transcript of the Board's proceedings.

4. Petitioner's objection respecting the alleged inadequacy of findings by the Board falls into the same category. Until now petitioner had never suggested that the opinion of the neutral members was not subscribed to by the concurring carrier members respecting every finding sustaining the award. Nor is such a suggestion tenable. See the separate statement of the carrier members (J. A. 90), the introductory paragraphs of the award itself (J.A. 9-11), and the opinion of the District Court (Pet. No. 935, App. C p. 13a). Petitioner's contention that the neutral members' opinion does not contain sufficient findings is equally frivolous (Pet. p. 34). As the District Court stated, that opinion is "comprehensive and well reasoned . . . [and] includes findings of fact" (Pet. No. 935, App. C p. 10a).

5. As to the proper scope of judicial review, as we pointed out in the carriers' response in No. 935 (pp. 12, 20 n. 12), the courts below tested the award by the substantial evidence standard—the very criterion urged by petitioner—and found it valid.[3]

6. Petitioner contends that the Board did not comply with the requirement of the statute respecting the incorporation in the award of matters as to which the Board found the parties had agreed. The lower courts, however, found that the Board did incorporate all such matters in the award (Carriers' Brief, No. 935, pp. 10-12). While petitioner evidently disagrees with the findings of the Board as to the existence of agreements and tentative agreements, both lower courts

[3] We assume *arguendo* that judicial review and findings of fact are constitutionally required. *Contra: Switchmen's Union of North America* v. *National Mediation Board*, 320 U.S. 297; *Union Pacific R. Co.* v. *Price*, 360 U.S. 601, 615-616.

held those findings were supported by substantial evidence. That, we submit, should be the end of the matter.

7. At some points petitioner appears to be attacking the merits of the award of the Arbitration Board. As the courts below correctly held, such contentions are not open to judicial review (Pet. No. 935, App. C, p. 13a). It may be added that an analysis of the provisions of the Award and of the opinion of the neutral arbitrators confirms the observation of the lower courts that the "board displayed extreme consideration and even benevolence for the future of employees in regular service" (*id.*, p. 15a). (See carriers' response in No. 935, pp. 8-10, for a discussion of the Award.)

8. This petition's lack of merit is further evidenced by petitioner's attempt to secure review on the basis of the three-judge court issue raised by petitioners in No. 935. It is well-settled that a three-judge court need not be convened where no injunctive relief is sought. *E.g., Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 154-155. Petitioner did not seek any injunctive relief below. Although petitioner did include a prayer for a temporary restraining order and a preliminary injunction in its complaint (J.A. 271Z-10, 11), it did not pursue this relief when the hearing on the merits was expedited. See discussion in Carriers' Brief in No. 935, p. 29 n. 22. The only final relief it sought was "a judgment impeaching and vacating the Award of Arbitration Board No. 282" (J.A. 271Z-11). Accordingly, there was no basis for convening a three-judge court.

Petitioner now asserts that "[t]he district court was mistaken in attributing to petitioner the expression

of a view that 28 U.S.C. § 2282 is inapplicable to this case. . . ." (Pet. 39). Since the section *is* inapplicable, it does not matter whether or not petitioner expressed that view.

The District Court made no mistake, however. It stated that counsel for petitioner had "expressly and affirmatively declined to join in the application [for a three-judge court]" (Pet. No. 935, App. C p. 20a). This statement was based on the following unequivocal passage in the record:

> "Mr. Malin [Counsel for Petitioner]: Your Honor, speaking as counsel for the plaintiffs in 2921, I understand that the motion [for convening a three-judge court] made by counsel in 2919 would not in itself apply to 2921.
>
> "The Court: Not unless you join in it.
>
> "Mr. Malin: I do not join in it.
>
> "The Court: Very well." (J.A. 329)

CONCLUSION

For the reasons given above and for the reasons given in the responses of the carriers and the government in No. 935, we respectfully submit that the petition for certiorari should be denied.

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